IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE TWENTY EIGHTH DAY OF JANUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE G. BIKSHAPATHY

and
THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION NO : 7893 of 2001

Between:

Burada Kanaka Ratnam, Roll No.A-16,

W/o.Late Suryaprakasha Rao,
R/o. C/o.Y.Satyanarayana, Door No.44-12-17,
Annapurnamapeta, Rajahmundry, East Godavari District.

..... PETITIONER

AND

1 The Senior Superintendent of Posts,

Bhimavaram Division,
Bhimavaram, West Godavari District-534 201.
2 The Post Master General,
Vijayawada.
3 The Chief Post Master General,
Hyderabad.
4 The Administrative Officer, Office of the Director,
Postal Training Centre, Mysore,
Karnataka-570 010.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an appropriate writ, order or direction more particularly one in the nature of Writ of Certiorari calling for the records

in O.A.No.1713 of 1998 on the file of Central Administrative Tribunal, Hyderabad and to Quash the order in O.A.No.1713 of 1998 and the Memo.No.TRG-1/2-1/151 at Mysore dt:19.11.1998 issued by the 4th respondent.

Counsel for the Petitioner:MRS.NANDA R. RAO

Counsel for the Respondents : MR.ARAJASHEKAR REDDY **(SC** FOR CG)

The Court made the following :

ORDER: (per P.S.Narayana.,J)

Burada Kanaka Ratnam, the writ petitioner filed the present Writ Petition praying for issuance of a writ of certiorari calling for records in O.A.No.1713/98 on the file of Central Administrative Tribunal, Hyderabad, hereinafter in short referred to as “Tribunal” for the purpose of convenience, and quash the said order and the Memo No.TRG-1/2-1/151 at Mysore dated 19-11-1998 issued by the 4th respondent and to pass such other suitable orders.

The petitioner claims to be a widow and it is stated that her name was sponsored by Employment Exchange, Eluru in connection with recruitment of Postal Assistants in Bhimavaram Postal Division for the year 1997 and subsequent thereto on 24-9-1998 she was interviewed in the office of the Superintendent of Posts, Bhimavaram Region, Bhimavaram and thereafter she was directed to undergo induction training for a period of two months at Postal Training Centre, Mysore for appointment as Postal Assistant by proceedings

of Senior Superintendent of Post Offices, Bhimavaram Division dated 30-9-1998. After completing necessary formalities, the petitioner reported for training at the Postal Training Centre, Mysore. While she was undergoing training, the 4th respondent discharged her from Session with effect from 19-11-1998 Forenoon by Memo No.TRG-1/2/1-151 dated 19-11-1998 as per the Telegraphic Information received from the 1st respondent on 18-11-1998 and further directed to report to the 1st respondent. It was further stated that in the affidavit filed in support of the Writ Petition that the 1st respondent directed the writ petitioner to credit the amount of Rs.1742/- which was paid to her towards stipend for the period from 5-10-1998 to 31-10-1998 in connection with the aforesaid Training. On 8-12-1998 once again the 1st respondent directed the writ petitioner to credit the amount and when the writ petitioner approached the 1st respondent personally, the 1st respondent stated that she had illicit contact with one K.Satyanarayana, R.T.C. Conductor, Eluru, West Godavari District and if the same is not made she would be arrested in a case to be filed against her and the writ petitioner also was orally informed that she was no longer in service in Postal Department. It was further pleaded that discharge was made without giving notice and the same is illegal and in violation of principles of natural justice. It is further stated that the Tribunal by the order dated 16-12-1999 dismissed the

O.A.No.1713/98 on the ground that the writ petitioner was remarried and hence she does not enjoy the status of the widow any longer. It was also specifically pleaded that the writ petitioner had not married the said K.Satyanarayana and even the said K.Satyanarayana had specifically stated so in his reply to the charge of remarriage and in fact he had removed her name from P.F. benefits and had placed the names of his two sons. Absolutely there is no evidence to show that the writ petitioner had remarried the said K.Satyanarayana and hence assailing the said order, the present writ of certiorari was filed by the writ petitioner.

The respondents filed a counter affidavit in detail even before this Court taking the self-same stand which they had taken before the Tribunal. It was pleaded n para-3 of the counter affidavit that Smt.Burada Kanakaratnam, the writ petitioner herein, was sponsored by the Employment Exchange, Eluru for recruitment to the cadre of Postal Assistant for the year 1997 under O.B.C. category. The objective-type test was conducted on 30-5-1998 and the Type test and Interview were conducted on 24-9-1998. On the date of interview, the writ petitioner submitted the death certificate of her husband and also gave a letter declaring that her husband expired in 1976 and she was not remarried. In the D.P.C. held on 24-9-1998 the writ petitioner was selected as Postal Assistant under OBC category by allowing the age relaxation of ten years under widow category as

sponsored by the Employment Exchange, Eluru and she was directed to Postal Training Centre, Mysore along with other candidates for Induction training commenced on 5-10-1998. It was further pleaded in para-4 of the counter affidavit that the death certificate submitted by the writ petitioner was sent to the Superintendent of Post Offices, Rajahmundry on 16-10-1998 for verification as it was issued by the Gram Panchayat, 'G' Kothapalli, East Godavari District and the Superintendent of Post Offices, Rajahmundry was also requested to cause enquiries in the village about her widow status. The O.B.C. certificate submitted by the writ petitioner was sent to Superintendent of Post Offices, Eluru for verification and report. It was also requested to verify the widow status of the writ petitioner at the address given by her. It was further stated that the Superintendent of Post Offices, Rajahmundry in his letter No.B3/3/Misc. dated 11-11-1998, which was received on 13-11-1998, returned the death certificate duly verified. The Superintendent of Post Offices, Rajahmundry further informed that the writ petitioner re-married one R.T.C. Conductor after 12 years from the date of death of her first husband and she is having one daughter by her first husband and a son through the second husband. The writ petitioner was recalled from the Postal Training Centre, Mysore as she had given a false declaration on 24-9-1998 that she had not re-married after the death of her husband and since she got selection as a result

of age relaxation of 10 years given under widow category. The date of birth of the writ petitioner is 19-4-1960 and the upper age limit for O.B.C. candidate is 28 years for selection to the post of Postal Assistant. At the time of sponsoring by the Employment Exchange, Eluru her age was 37 years. The Director, Postal Training Centre, Mysore was requested to discharge the petitioner from training with instructions to attend the office of the 1st respondent. The Postal Training Centre, Mysore discharged the writ petitioner on 19-11-1998 Forenoon and she attended the office of the 1st respondent on 23-11-1998 accompanied by her father and gave a statement in the presence of her father Meesala Suryanarayana. In her statement, the writ petitioner stated that her husband B.Surya Prakasa Rao expired on 12-11-1976 at 'G' Kothapalli village in East Godavari District and she has been living with Sri Kancherlapalli Satyanarayana, R.T.C. Conductor, Eluru for the last ten years and she had a son through Kancherlapalli Satyanarayana, R.T.C. Conductor and his name is Kancherlapalli Siva Prasad and he is studying 5th class in Bahuguna Memorial Police School, Eluru and she also stated that her name had been recorded in the service records of Kancherlapalli Satyanarayana as nominee. It was also further pleaded in para-5 of the counter affidavit that in the light of the aforesaid facts, the writ petitioner was directed to credit the stipend paid to her for the month of October, 1998 during the training period but she had not so far

credited the stipend amount. Meanwhile another report was received from the Superintendent of Post Offices, Eluru by Lr.No.B/Misc. dated 30-12-1998 informing that enquiries made with the A.P.S.R.T.C. authorities, Eluru revealed that Kancharla Satyanarayana, RTC conductor No.69805 s/o. Hanumantha Rao is working as Conductor in Eluru Depot and he had submitted a revised nomination for P.F. benefits on 1-12-1995 nominating the writ petitioner as wife to the extent of 50% and his two sons Srinivas and Vijay Kumar to the extent of 25% each which was accepted by the R.T.C. authorities on 13-12-1995. The Depot Manager, A.P.S.R.T.C., Eluru in his Lr.No.E/255(Genl)98-ELR dated 4-1-1999 informed that as per personal case and service register of Kancherlapalli Satyanarayana E.69805, Conductor of Eluru Depot, Smt.Kanaka Ratnam, the writ petitioner, is his wife. It was further pleaded in para-6 of the counter affidavit that the writ petitioner filed O.A.No.1713/98 on the file of Central Administrative Tribunal, Hyderabad seeking the relief of reinstatement as Postal Assistant Induction Trainee or in any suitable post. The Tribunal issued interim order with directions to send the applicant for the training for the next course to Postal Training Centre, Mysore by order dated 21-1-1999 and based on the interim orders of the Tribunal, the writ petitioner was again deputed for training with effect from 10-5-1999 by Memo No.B5/PAs/Trg/99 dated 3-5-1999. It was further pleaded in para-7 of the counter affidavit that the

petitioner failed to secure the required marks in all the tests held and also in the final test held on 23-7-1999 and she was one of the five candidates who failed to secure the passing marks in the final test held on 25-6-1999. Her training was extended by 15 days and then a test was conducted on 9-7-1999 and in respect of the said test also she failed to secure the required marks. The writ petitioner was given two more chances to pass the qualifying test but she had not been able to get qualifying marks and therefore she could not be certified fit for appointment. The marks secured by the writ petitioner as furnished in the counter affidavit are as hereunder :

Date of Re-test Marks: Paper-I Marks : Paper-II

9-7-1999 22 19

16-7-1999 24 32

23-7-1999 19 39

It was stated in para-8 of the counter affidavit that in the meanwhile M.A.No.326/99 was filed by the Department in the Tribunal which was dismissed on 28-4-1999 and later the writ petitioner sent xerox copies of revised nominations of Kancharlapalli Satyanarayana, RTC conductor, Eluru issued on 12-4-1999 by deleting the name of the

petitioner. It was further pleaded in para-9 of the counter affidavit that the Tribunal dismissed the O.A. on 16-12-1999 upholding the action of the 1st respondent and basing on the final orders of the Tribunal the name of the writ petitioner was deleted from the select list as the petitioner was not entitled for the age relaxation available to widow candidates since the writ petitioner got re-married after the death of her husband and she is no longer in widow status. It was further pleaded in para-10 of the counter affidavit that the writ petitioner was selected to the cadre of Postal Assistant under O.B.C. category by allowing age relaxation of ten years under widow category. The enquiries made by the Department revealed that the writ petitioner got re-married after the death of her husband and was no longer in widow status. As the petitioner claimed the benefit by giving false declaration, the Postal Training Centre, Mysore was asked to discharge the petitioner from the Training center as the widow status of the applicant was found bogus. In reply to para-4 of the affidavit of the writ petitioner, at para-11 of the counter affidavit of the respondents it was pleaded that the petitioner was directed to credit back the stipend paid to her during the training period as she was discharged from the Postal Training Centre. It was specifically pleaded that there is no truth in the allegation that the 1st respondent threatened the writ petitioner etc. In reply to para-5 of the affidavit of the writ petitioner, in para-12 of the counter affidavit it was pleaded

that since the writ petitioner is not appointed as Postal Assistant on regular basis, there is no case for issuing a notice. As the petitioner had been living with an A.P.S.R.T.C. employee of the State Government since ten years and also had a son through him, the widow status of the writ petitioner was found to be questionable. It was further stated that the writ petitioner got selection as Postal Assistant by getting age relaxation under widow status and in the statement given by the writ petitioner on 23-11-1998 she stated that she has been living with K.Satyanarayana, R.T.C. Conductor, Eluru as nominee. The R.T.C. authorities also accepted the nomination given by Kancherlapalli Satyanarayana, R.T.C. Conductor. The statement given by the petitioner on 23-11-1998 and the revised nomination given by K.Satyanarayana, R.T.C. Conductor showing the name of the writ petitioner had proved that her widow status is not correct. The other allegations also had been denied in the counter affidavit.

Smt.Nanda R.Rao, the learned Counsel representing the writ petitioner had taken this Court through the impugned order questioned in the O.A. and also the relevant portions of the order made in the O.A. which had been challenged by way of the present Writ Petition. The learned Counsel would contend that absolutely there is no proof of remarriage and unless there is clear proof of remarriage, the writ petitioner won't cease to be a widow and her

status as a widow continues. The learned Counsel also would maintain that no specific statutory provision or service rule or regulation had been shown that on the ground of unchastity or on the ground on which the writ petitioner had been disqualified the writ petitioner would cease to be a widow in the eye of law. The learned Counsel also would submit that the mere fact that the writ petitioner begot a child by living with the said K.Satyanarayana would not alter the status of the writ petitioner in any way as a widow and she continues to enjoy the status of the widow whatever may be the other legal rights of the illegitimate child under the relevant personal law. The learned Counsel also would ultimately conclude that the Courts of law are expected to enforce the provisions of law and unless the respondents are able to show any specific legal bar in this regard, the discharge is illegal and the same is in violation of principles of natural justice and hence the impugned order made by the Tribunal cannot be sustained. The learned Counsel also placed reliance on certain decisions in this regard.

Per contra, the learned Senior Standing Counsel for Central Government would submit that this is a matter relating to service and it is not a case of any malafide action. The authorities made bona fide enquiries and on the material available on record, the respondents were satisfied that on a misrepresentation relating to her status as a widow, she got relaxation and made an attempt to enter the service. It

was at that stage having detected the same the 4th respondent had communicated the order which had been questioned in the O.A. aforesaid. The Counsel also had pointed out to the relevant portion where a finding of fact had been recorded and the Counsel would point out that this is not a case where a finding had been recorded without any evidence and on the material available on record inasmuch as the authorities had arrived at the correct conclusion and on the aspect of remarriage a finding of fact on the basis of such evidence and also on inference had been made by the Tribunal and also in view of the limitations imposed on a writ Court while exercising writ jurisdiction and issuance of writ of certiorari in particular, the impugned order needs no disturbance at the hands of this Court.

Heard both the Counsel.

The facts already had been narrated supra and the same need not be repeated again. This Court by order dated 28-12-2004 directed the writ petitioner to produce educational certificate of the son of the petitioner and the same was not produced. The relevant portion of the order impugned in the O.A. dated 19-11-1998 reads as hereunder :

> "Smt.B.Kanakaratnam (Roll NO.A-16) PA Induction trainee, who has reported for training at this center on the forenoon of 5.10.98 is hereby discharged from the session with effect from 19.11.98 forenoon as per the telegraphic information received from the Sr.Supdt. of Pos, Bhimavaram on 18.11.1998.
>
> The candidate should immediately report to the Senior Supdt.

of Pos, Bhimavaram".

Even before the Tribunal specific stand was taken by the Department relating to the remarriage of the writ petitioner with Sri K.Satyanarayana. Even in the rejoinder filed before the Tribunal, the Writ Petition had taken a specific stand that she had not remarried K.Satyanarayana even though she resided with him and got a child through him and in that event she cannot be considered as a legally wedded wife of Sri K.Satyanarayana and further K.Satyanarayana had withdrawn his nomination for P.F. benefits and the applicant also had been discharged from service and thus the applicant not only lost the employment but also the share from P.F. of K.Satyanarayana and she was put to disadvantage from all angles and hence she should be allowed to continue in service as Postal Assistant. The Tribunal had discussed the facts and also had taken into consideration the respective pleadings of the parties and had recorded a finding at para-6 as hereunder :

> "We have heard both the sides. The applicant was sent to PTC, Mysore along with other candidates for induction training for appointment as Postal Assistant. She was sent for training on 5-10-1998. On that day, it is evident from letter No.B/Misc. dated 30-12-1998 (Annexure-4 to the reply) that Sri K.Satyanarayana, RTC Conductor had nominated her even earlier from 1-12-1995 to receive his PF benefits stating that she is his wife. That letter is also accepted by the Depot Manager, Eluru Depot wherein it was stated that on verification of P.case and SR of Sri K.S.Narayana, E.69805 Conductor of Eluru Depot Smt.Kanaka Ratnam (applicant herein) is his wife.

> Hence the respondents had sufficient proof to come to the conclusion on 5-10-1998 that the applicant had re-married and she is not a widow. Hence the decision taken by the respondents that the age relaxation given to her is invalid as she was not a widow on the day of submitting her application and on the day of sponsoring her to Postal Training Centre."

It is needless to say that this is a finding of fact. What had been contended in elaboration by the learned Counsel for the writ petitioner is that there is no clear proof relating to remarriage of the writ petitioner and on the mere fact of the nomination made by Satyanarayana or on the mere fact that the writ petitioner begot a child while living with Satyanarayana, it cannot be said that the factum of remarriage had been established and hence the writ petitioner would not lose the status of a widow. In other words, the specific stand taken by the writ petitioner is that unless in service jurisprudence there is a specific statutory provision, rule or regulation relating to disqualification on the ground of unchastity or immoral life, this ground is not available and the discharge made without affording opportunity is definitely bad in law.

This is a case involving legality, morality and equity. Morality and legality are two different concepts. Many a time they do coincide and quite often they won't. Whether a widow would lose the status of a widow for being considered for the benefit of either reservation or relaxation falling under widows quota because of her unchaste life or begetting a child through another person without a remarriage is the

question in controversy which had been argued in elaboration. Traditionalism, intolerance by the society, immorality or unchastity, according to the Counsel for the writ petitioner, cannot operate as a bar relating to enjoyment of the status of a widow unless the service rules, regulations, scheme or policy in such cases clearly specify such disqualification while conferring such benefits. It is no doubt true that Courts of Law are bound to enforce Law. Submissions at length were made relating to the burden of proof and the discharge of burden of proof relating to the factum of marriage and the validity of the marriage. In **NARSIMHULU Vs. MANEMMA** while dealing with Sections 4, 6 Proviso, Sections 24 to 26 and 28 of Hindu Succession Act, 1956 and right of inheritance vis-à-vis unchastity it was held :

> "Unchastity of a widow is not a bar to inherit her deceased husband's estate. S.4 provides that any pre-existing law, which is inconsistent with the provisions of the Act, shall cease to have effect. Sections 24 to 26 prescribe disqualifications; and Section 28 removes disabilities. Under the Shastrik law preceding the Act, unchastity of a widow was a disqualification. But the legislature did not engraft the unchastity as a disqualification. Under Section 24 remarriage was provided as a disqualification but not unchastity. On the other hand, Section 28 engrafts a wide language 'on any other ground whatsoever' encompassing within its ambit any other ground which was a disqualification under the Shastrik law excepting those disqualifications expressly recognized. Articles 14 and 15 of the Constitution provide equality of every citizen regardless of sex and prohibits invidious discrimination, enables the legislature to make inroads into the pre-existing law. The legislature felt the need most acute to remove many a disability under which the Hindu women are reeling from in matters of inheritance, succession rights. It animated to

remove all the disabilities except those prescribed under the Act, used the appropriate language in Section 4 and chose not to make unchastity a disqualification. On the other hand, Section 28, while enumerating removal of named disabilities, used in a wide language 'on any ground whatsoever' which engulfs in its ambit 'unchastity too'. Youthful urge and satiety of biological need may lead to astray and its abhorrence to keep to family prestige or social cohesion may be understandable. But moral or righteous indignation to unchastity or ethical foundation or sentiments of the people 'would not should not' stand in the way to the statutory construction of the wide language 'on any ground whatsoever' and effect given. The doctrine of ejusdem generis cannot be applied while interpreting the term "on any ground whatsoever" and it must be construed broadly. The legislature intended to wipe out the pre-existing disqualification of unchastity as a bar to succeed to the deceased coparcener".

In **YAMUNABAI Vs. ANANTRAO** while dealing with the expression "wife" used in Section 125 Cr.P.C. and also Sections 5, 11, 12, 14, 16 of the Hindu Marriage Act, 1955, the Apex Court held at paras 3, 4, 5 and 6 as hereunder :

"For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) have to be examined. Section 11 of the Act declares such a marriage as null and void in the following terms :-

"11. Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5".

Clause (i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognized in law and

custom. A reference was made to Section 12 of the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By reason of the overriding effect of the Act as mentioned in Section 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. So far as Section 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnized in violation of Section 5(i) of the Act. Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the Section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16, which is quoted below, also throw light on this aspect :-

“16. Legitimacy of children of void and voidable marriages.- Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been in legitimate child of the parties of the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of

possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

Sub-section (1), by using the words underlined above clearly implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by Section 12, sub-section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Sections 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception.

The question then arises as to whether the expression 'wife' used in Section 125 of the Code should be interpreted to mean only a legally wedded wife not covered by Section 11 of the Act. The word is not defined in the Code except indicating in the Explanation its inclusive character so as to cover a divorce. A woman cannot be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must, therefore, be given the meaning in which it is understood in law applicable to the parties, subject to the Explanation (b) which is not relevant in the present context.

It has been contended on behalf of the appellant that the term 'wife' in Section 125 of the Code should be given a wider and extended meaning so as to include therein not only a lawfully wedded wife but also a woman married in fact by performance of necessary rites or following the procedure laid down under the law. Relying upon the decision of this Court in Mohd. Ahmed Khan v. Shah Bano Beghum (1985) 3 SCR 844 : (AIR 1985 SC 945), it was argued that the personal law of the parties to a proceeding under Section 125 of the Code should be completely excluded from consideration. The relationship of husband and wife comes to an end on divorce, but a divorcee has been held to be entitled to the benefits of the section, it was urged, and therefore applying this approach a woman in the same position as the present appellant should be brought within the sweep of the section. We are afraid, the argument is not well founded. A divorcee is included within the section on account of clause (b) of the Explanation. The position under the corresponding Section 488 of the Code of 1898 was different. A divorcee could not avail of the summary remedy.

The wife's right to maintenance depended upon the continuance of her married status. It was pointed out in Shah Bano's case that since that right could be defeated by the husband by divorcing her unilaterally under the Muslim Personal Law or by obtaining a decree of divorce under any other system of law, it was considered desirable to remove the hardship by extending the benefit of the provisions of the section to a divorced woman so long as she did not remarry, and that was achieved by including clause (b) of the Explanation. Unfortunately for the appellant no corresponding provision was brought in so as to apply to her. The legislature decided to bestow the benefit of the section even on an illegitimate child by express words but none are found to apply to a de facto wife where the marriage is void ab initio.

The attempt to exclude altogether the personal law applicable to the parties from consideration also has to be repelled. The Section has been enacted in the interest of a wife, and one who intends to take benefit under sub-section (1)(a) has to establish the necessary condition, namely, that she is the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes her status on (or) relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the Section is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the section is attracted or not cannot be answered except by the reference to the appropriate law governing the parties. In our view the judgment in Shah Bano's case (AIR 1985 SC 945) does not help the appellant. It may be observed that for the purpose of extending the benefit of the section to a divorced woman and an illegitimate child the Parliament considered it necessary to include in the Section specific provisions to that effect, but has not done so with respect to women not lawfully married".

In **BHAURAO Vs. STATE OF MAHARASHTRA** while dealing with Section 17 of the Hindu Marriage Act, 1955 and Section 494 IPC it was held by the Apex Court at paras 3, 4 and 5 as hereunder :

"Section 494 IPC reads :

> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

Prima facie, the expression 'whoever…….marries' must mean 'whoever…. marries and whose marriage is a valid one. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife".

Apart from these considerations, there is nothing in the Hindu law, as applicable to marriages till the enactment of the Hindu Marriage Act of 1955, which made a second marriage of a male Hindu, during the lifetime of the previous wife, void. Section 5 of the Hindu Marriage Act provides that a marriage may be solemnized between any two Hindus if the conditions mentioned in that section are fulfilled and one of those conditions is that neither party has a spouse living at the time of the marriage. Section 17 provides that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of Sections 494 and 495 IPC shall apply accordingly. The marriage between two Hindus is void in view of Section 17 if two conditions are satisfied : (i) the marriage is solemnized after the commencement of the Act; (ii) at the date of such marriage, either party had a spouse living. If the marriage which took place between the appellant and Kamlabai in February 1962 cannot be said to be 'solemnized' that marriage will not be void by virtue of Section 17 of the Act and Section 494 IPC will not apply to such parties to the marriage as had a spouse living.

The word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form, according to the Shorter Oxford Dictionary. It follows,

> therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and due form' it cannot be said to be 'solemnized'. It is, therefore, essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494 IPC applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom."

Strong reliance was placed on **VIMALA Vs. VEERASWAMY** wherein the Apex Court while dealing with Sections 5 and 11 of the Hindu Marriage Act, 1955 and Section 125 Cr.P.C., 1973, held that a second marriage during subsistence of earlier marriage at the time of solemnization of such second marriage is void and clear proof of earlier marriage and not mere living as husband and wife, is essential and entries in insurance policy and family identity card issued by employer are not sufficient proof of marriage. In **JOGINDER SINGH Vs. JOGINDERO** while dealing with Section 5 of Hindu Marriage Act, 1955, remarriage and proof thereof, where mutation was made in revenue record basing on the alleged statement of re-marriage by the plaintiff and there being no statement of plaintiff on record to show the admission that she had remarried and where birth entry also was relied in support of re-marriage without there being no evidence to show that the said birth entry related to the daughter born out of wedlock between the plaintiff and her second husband and the real brother of the second husband denied his brother's marriage, the

finding of re-marriage by the plaintiff was held liable to be set aside. In **SURJIT KAUR Vs. GARJA SINGH** while dealing with Section 17 of the Hindu Marriage Act, 1955 and customary marriage and proof thereof when custom was not pleaded and the nature of ceremonies performed were not brought out, it was held that living together as husband and wife would not confer status of husband and wife. In **PAYAL SHARMA Vs. SUPERINTENDENT, NARI NIKETAN KALINDRI VIHAR, AGRA** a Division Bench of Allahabad High Court while dealing with immorality and illegality held that the petitioner therein being a lady of about 21 years of age, being a major, has right to go anywhere and to live with any one, and a man and woman even without getting married can live together if they wish and this may be regarded immoral by Society but it is not illegal.

On the strength of these decisions, submissions at length were made by the Counsel for the writ petitioner that in the absence of clear proof relating to remarriage, the finding recorded by the Tribunal in this regard cannot be sustained.

Courts in India are Courts of Law and Courts of Equity as well. Equity jurisdiction and exercise thereof cannot be held to be totally foreign to service jurisprudence though this branch of Law would be well governed by the statutes, rules and regulations. It is no doubt true that when Law is clear on the point, legality may have to prevail over morality and Equity jurisdiction may have to yield to the clear

legal position in this regard.

It is pertinent to note that this Court as a writ Court is exercising its jurisdiction under Article 226 of the Constitution of India and the relief prayed for is the issuance of a writ of certiorari. The concept of burden of proof in its literal sense cannot be imported while deciding a case of this nature. This aspect cannot be stretched too far and to be exercised within the permissible limits while exercising the writ jurisdiction in general and the issuance of a writ of certiorari in particular, the same being discretionary and supervisory in nature. It is made clear that this is not a case where any malafide action had been complained of by the writ petitioner or there is abuse of the discretionary power. The very object of a writ of certiorari is to keep all inferior tribunals and subordinate Courts within their limits and this aspect had been well explained by their Lordships of the Privy Council in **RYOTS OF GARABANDHO Vs. ZAMINDAR OF PARLAKIMEDI .** As already referred to supra, issuance of a writ of certiorari is discretionary and supervisory in nature and questions of fact cannot be decided in a certiorari proceeding. In **T.C. BASAPPA Vs. T.NAGAPPA** the Apex Court observed :

> "As is well known, the issue of the prerogative writs, within which certiorari is included, had their origin in England in the King's prerogative power of Superintendence over the due observance of law by his officials and Tribunals. The writ of certiorari is so named because in its original form it required that the King should be "certified of" the proceedings to be investigated and the object was to secure by the authority of a

superior court, that the jurisdiction of the inferior Tribunal should be properly exercised…….".

The evolution and the historical background of the prerogative writs in general and the writ of certiorari in particular had been discussed in elaboration in **RUPA ASHOK HURRA Vs. ASHOK HURRA .** In **MOON MILLS Vs. INDUSTRIAL COURT, BOMBAY** the Apex Court held that a writ of certiorari is legally a matter of sound discretion and will not be granted if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party. In **SYED YAKOOB Vs. RADHAKRISHNAN** the Apex Court while dealing with the a writ of certiorari and the limitations thereof held at para-7 as hereunder:

"The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals : these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or

questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the influence of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised."

I n **VANGURI MARIAMMA Vs. KANDUKURI GANGAMMA** while dealing with the jurisdiction of High Court to issue a writ of certiorari and parameters to exercise such jurisdiction held as hereunder :

"The parameters laid down by the Apex Court are that the jurisdiction of High Court to issue a writ of Certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal basing on the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of *certiorari* can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to take into consideration the relevant evidence, or had erroneously taken into consideration irrelevant evidence, which has influenced the impugned finding. Similarly, if a finding of fact is based on

> no evidence, that would be regarded as an error of law which can be corrected by a writ of *Certiorari*. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding being within the exclusive jurisdiction of the Tribunal, cannot be reappreciated by this Court exercising jurisdiction under Article 226 of the Constitution of India."

In **J.PUSHPALATHA Vs. ELECTION TRIBUNAL, BHONGIR** it was held that while dealing with the orders of inferior Tribunals, in its certiorari jurisdiction, this Court cannot sit in appeal against such orders. Even where a different view is possible on the same set of facts and evidence, the finding recorded by the Tribunal cannot be disturbed and it is rather a decision making process and not the decision itself that will be the concern of this Court. In **R.JAYALAKSHMAMMA Vs. ELECTION TRIBUNAL-CUM-SENIOR CIVIL JUDGE** it was held as hereunder :

> "It is well settled that while judicially reviewing the decision of a statutory tribunal, High Court ordinarily does not substitute its opinion for the opinion or finding recorded by the Tribunal on appreciation of oral and documentary evidence. Merely because other view is also possible from such reappreciation of same evidence, it cannot be a ground for High Court to deviate from the finding of the fact recorded by the Tribunal, reappreciate the evidence on record and give its own finding which is different from the finding recorded by the Tribunal….".

In **ASSOCIATED CEMENT CO. Vs. P.D. VYASA** it was held that in a petition for a writ of certiorari it would normally not be open to the employer-petitioner to challenge the merits of the findings made by the authorities under the Industrial Employment (Standing Orders)

Act, (1946).

On the settled principles relating to exercise of certiorari jurisdiction the decisions are two numerous and the well settled principles need no repetition at the hands of this Court. The fact that the writ petitioner had been staying with one K.Satyanarayana, is not in controversy. The fact that the writ petitioner also was nominated at a particular point of time by the said K.Satyanarayana for Provident Fund benefits also is not in controversy, No doubt it is stated that subsequent thereto it had been withdrawn. The fact that the writ petitioner begot a child through K.Satyanarayana also is not in controversy. It is also pertinent to note that when the writ petitioner was directed to produce the educational certificate of her child through the said Satyanarayana, the same was not produced before this Court. Clear findings had been recorded on the strength of the respective pleadings and also on the material available on record which are findings relating to fact to the effect that there was remarriage. The principles of burden of proof relating to proof of factum of marriage which had been referred to supra by the decided cases in relation to the other maintenance claims or in proof of the findings of bigamy cannot be imported in toto in appreciating such questions in relation to employment matters under service jurisprudence. Be that as it may, the fact remains that a finding had been recorded in this regard

and even if the said finding is based on insufficient evidence it cannot be a ground for disturbing such a finding while exercising certiorari jurisdiction. It is not a case of inherent lack of jurisdiction of the Tribunal to make the impugned order or it is not a case of no evidence at all or lack of evidence, but on the material available on record it is just and reasonable to draw such an inference and drawing such reasonable inference, a finding of fact had been recorded by the Tribunal and the said finding need not be disturbed by this Court, both in law and also on the ground of equity. A finding of fact based on just and reasonable inference recorded by a Tribunal can neither be said to be based on no evidence nor a perverse finding so as to be amenable to be disturbed by exercising the certiorari jurisdiction.

Several submissions which are more technical in nature made by the learned Counsel for the writ petitioner definitely do not find favour with this Court and this Court is not inclined to accept the said submissions in the light of the reasons recorded supra. The object of conferring such benefit or giving such relaxation to the widows also may have to be kept in mind while deciding a matter of this nature. Hence, the decision taken by the respondents and also the impugned order made by the Tribunal in the present Writ Petition need not be disturbed in any way especially in view of the well defined limitations in exercise of the powers while issuing a writ of

certiorari. Hence, the Writ Petition being devoid of merit, the same shall stand dismissed. This Court however makes no order as to costs.

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Justice G.Bikshapathy

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Justice P.S.Narayana

Date : -1-2005

L.R. copy to be marked : YES / NO

AM

To:

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